

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN - WATERLOO DIVISION

UNITED STATES OF AMERICA Plaintiff, vs. FRANKIE LEE FINK, Defendant.	No. CR 00-2014 MJM ORDER
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The matter before the Court is the defendant's motion for new trial (doc. no. 55). The defendant claims the motion should be granted for three principal reasons: (1) the prosecution attorney violated a motion in limine order; (2) the prosecution attorney asked questions about a redacted portion of a grand jury transcript exhibit; and (3) improper closing argument. For the reasons discussed below, the Court finds the motion for new trial should be granted.

A. Background

In order to analyze the defendant's motion for new trial, some background of the case and the context within which the motion is made needs to be discussed. In this case, the defendant is charged with two counts. He is charged with a violation of 18 U.S.C. § 1001, lying to the FBI, and one count of perjury before a federal grand jury.

The alleged lies and perjured testimony in this case arise out of two cross burning incidents in Quasqueton, Iowa. A number of residents at a mobile home park became upset over the fact that an interracial couple had moved into one of the mobile homes in the park. This attitude towards the interracial couple led to the despicable acts of burning a cross in front of the residence of the couple on two separate occasions. It is those cross burnings which led to the federal investigation in which the defendant made statements and testified in front of the grand jury.

The first cross burning occurred on July 7, 1997. The defendant was not involved in that cross burning and may not have had any knowledge of it prior to July 22, 1997. On July 22, 1997, the defendant was present with a number of other individuals at one of the mobile homes at the mobile home park where there was extensive drinking. During the course of the evening, the conversation turned to the July 7, 1997, cross burning. Apparently, a number of the individuals present taunted each other over their participation, or lack of participation, in the July 7, 1997, incident. This led to another cross burning on that evening. The defendant was not involved in the cross burning itself. Rather, the participants were Donald Von Lienen, Nick Leehey, and Howard Sawyer. A cross was burned in front of the home of the interracial couple. As indicated, the defendant did not participate in the cross burning but was aware that it had occurred.

Mr. Fink was subsequently interviewed by the FBI concerning the cross

burning incidents. The alleged false statements relate to Donald Von Lienen's participation in the cross burnings. Mr. Fink told the FBI, and later the federal grand jury, that he was told Von Lienen had participated in the July 7, 1997, cross burning. However, he also testified Von Lienen was with him the entire night of July 22, 1997. Mr. Fink told the federal grand jury, under oath, that Von Lienen never left the area of the party, and was at his side the entire night. Specifically, he said that Von Lienen was next to the defendant at the time the cross went up in flames on the evening of July 22, 1997. It is the Government's position that the defendant, Frankie Fink, attempted to provide a false alibi for Donald Von Lienen.

The defendant filed a number of motions in limine in this case. Essentially, the defendant, through his counsel, argued strenuously that the case should be confined to the issues of whether the defendant made false statements, whether there was any defense to the falsity of the statements such as mistake, and whether the statements were material. The defendant acknowledged that the fact of the cross burnings could not be kept out of the case. However, the defendant was also concerned that the Government not be allowed to "over try" the case with testimony and evidence about the cross burnings and racist statements and attitudes. Specifically, defense counsel indicated he was very concerned that the jury not be left with the message that the defendant should be convicted because of the outrageous conduct in burning the cross, or the racist attitudes of the defendant, Von Lienen, Leehey, and some of the

others who were at the party on July 22, 1997.

The Court granted in part, and denied in part, the defendant's motions in limine. Specifically, this Court made the comment that this case could not be "sanitized" to the extent the defendant wished it to be. To some extent, the defendant's racist attitudes could become relevant, particularly, on the issue of motive. The evidence showed that Mr. Von Lienen was only a very recent acquaintance of the defendant and the issue could arise during trial as to why a person would commit perjury in front of the grand jury for someone whom the defendant had only met a few days prior to the July 22, 1997, incident. On the other hand, the Court also made clear that the defendant was to be convicted, if he was convicted at all, only for his perjury and false statements, not for his racist beliefs or his agreement with the actions of the cross burners. To that end, the Court sustained the motion in limine to prohibit the FBI agent from testifying about certain racist comments the defendant made to him, and also granted a motion in limine to redact a portion of the grand jury transcript which was ultimately introduced into evidence in this case. It was made clear to the Government that the defendant should only be convicted if he made a false statement or committed perjury, and that any argument that the defendant should be convicted in order to send a message to express the jury's disapproval of cross burnings or its condemnation of racist attitudes would be wholly inappropriate. It is with that background that the Court addresses the motion

for new trial.

B. Questioning of the FBI Agent

The first ground alleged in support of the motion for new trial concerns an alleged violation of the Court's in limine ruling. As indicated, the Court had ruled that the Government could not solicit testimony from the investigating FBI agent about certain racist statements the defendant made in his interview with the agent. The defendant argues that the Government attempted to circumvent the ruling by asking the FBI agent about some statements and attitudes of Mr. Von Lienen, and then asking if the defendant agreed with those statements. Objections to those questions were sustained by the Court.

This Court finds that the Government was walking a very fine line in attempting to get into evidence material that the Court had excluded. However, even assuming the motion in limine Order was violated, the Court finds that any violation did not prejudice the defendant. Any implication that may have been left with the jury about the defendant's views were corroborated by the defendant's own testimony in which he testified about his attitude towards African-Americans. Consequently, the Court finds as to this ground, that a motion for new trial is not appropriate.

C. Reference to Redacted Testimony and Closing Argument

The Court finds that the other two grounds raised by the defendant do warrant the granting of a new trial. Before discussing these grounds specifically, the Court first notes the legal standard that is to be applied. Chief Judge Mark Bennett discussed the applicable law as applied to motions for new trial and, in particular, motions relating to improper Government comments during closing argument in United States v. Schneider, 157 F.Supp.2d 1004 (N.D. Iowa 2001). In determining whether there is reversible prosecutorial misconduct, the Court must first decide if the prosecutor's remarks were improper and then determine whether the remarks prejudicially affected the defendant's rights to a fair trial. United States v. Macklin, 104 F.3d 1046, 1049 (8th Cir. 1997). In determining whether the defendant's rights to a fair trial were prejudiced, the Court looks to the following factors: (1) the cumulative effect of the misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) any curative actions taken by the trial court. United States v. Cannon, 88 F.3d 1495, 1502 (8th Cir. 1997).

(1) Redacted Grand Jury Testimony

As indicated above, the defendant cites to a reference to the redacted portion of the grand jury testimony as one ground for a new trial. The Court had granted a motion in limine striking what the Court determined to be a highly prejudicial, and not particularly probative, section of the grand jury transcript.

During the testimony of FBI Agent Randy Van Gent, the following exchange

occurred at page 197, line 24, through page 198, line 9 of the trial transcript:

- Q. And, Agent Van Gent, the transcript that you have has been redacted and basically that - - what does that mean when we say a transcript is redacted?
- A. To me, redacted means that certain portions are eliminated or - - or blocked out.
- Q. And is there anything in those portions of the transcript that have been redacted that would prove that Frankie Fink would have been with Donald Von Lienen the entire night of - -

The Court: Well, let's just - - I don't want to go into that. Let's just - -

A sidebar followed that testimony. The Prosecutor was concerned that the jury might have the impression that some exculpatory testimony might be included in the redacted portion of the grand jury testimony. In fact, the opposite is true. The testimony was redacted because it was more prejudicial than probative. The Court reaffirmed its ruling that the Prosecutor could not get into the redacted portion of the testimony, but did admonish the jury that they were not to speculate as to what was in the redacted section of the grand jury transcript, nor the reason for the redaction.

The Government argues that the asking of the type of questions quoted above was appropriate. The Government claims it was concerned that the jury not believe the Government was hiding exculpatory evidence. The Prosecutor goes on to cite a

portion of a transcript from another case, involving a different prosecutor, in which the following exchange occurred.

Prosecutor: Now, there's - - on that page you're reading from, there's a big blank area. Then there's another blank area on the second to last page. Did the rest - I take it - have you reviewed the entire transcript without those blanks in there?

Witness: Yes, I have.

Prosecutor: And did anything in those blanks have to do with the theft of the motorcycles and the transportation back into Iowa?

Witness: No.

There was no objection to the question and answers in the case in which the above testimony was elicited and no allegations of any improper prosecutorial conduct. The Prosecutor in the case at bar argues that the questions in this case are similar

This Court believes that the question asked in this trial was improper. This Court is not convinced that the questions and answers given in the prior trial quoted immediately above are necessarily appropriate. How the trial judge in that case would have ruled had there been an objection is a matter of speculation. To the extent the Government believes that the jury should be advised that they should not speculate about the contents of the redacted portion of an exhibit, the appropriate way to handle that matter is to ask the Court to give an instruction to that effect to the jury. It is not appropriate to ask FBI agents about the contents of redacted testimony.

More importantly, there is a significant difference between the way the question was asked in this case and the way the questions were asked in the prior case. In the prior case, the Prosecutor asked if there was anything in the redacted portion of the transcript that related to thefts of motorcycles and the transportation back into Iowa (presumably the prosecution in that case involved the interstate transportation of stolen motorcycles). That is significantly different from a question which asks if there is anything in the redacted testimony “. . . that would prove that Frankie Fink would have been with Donald Von Lienen the entire night . . .” The clear implication that is left with the jury is that there is nothing in the redacted portion of the transcript that is helpful to the defendant. The jury almost certainly would conclude therefore that the redacted testimony is harmful to the defendant.¹

It is improper to ask an FBI agent to characterize the contents of a portion of an exhibit which the Court has previously ruled should be redacted because of its prejudicial nature. As previously stated, if counsel felt that the jury needed to be

¹My concern about the reference to the redacted portion of the transcript is heightened by my concern that the jurors have the mistaken impression that there is often significant amounts of highly inculpatory testimony that is suppressed. In visiting with jurors during voir dire, I have often been struck by the fact that jurors have the mistaken impression, derived mainly from television crime shows, that motions to suppress are routinely granted, and that defendants are acquitted because highly relevant testimony was excluded. The statement by the Prosecutor, to the effect that the redacted testimony was not in any way helpful to the defendant, only reinforces what I perceive to be the often mistaken impression of jurors that courts routinely suppress relevant evidence of guilt.

advised that it should not speculate as to the contents of the redacted portion of the transcript, then a request for an instruction from the Court should have been made.

(2) Closing Argument

If the reference to the redacted portion of the transcript had been the only problem, this Court might have been more reluctant to grant the motion for new trial. However, the issue that was argued most strenuously by defense counsel, and the one that raises the most significant concerns, relates to a portion of the Prosecutor's rebuttal argument. In her rebuttal, the Prosecutor stated as follows (Tr. p. 285, line 19; p. 286, line 18):

. . . even though this case is a false statement case, let me tell you something. That this is more than just a false statement or a perjury case. This is a case that goes to the very heart of what America is about: the right to live where you want to live without the threat or fear of intimidation from anyone or from people who will make false statements to protect someone who tries to violate the rights of a person who wants to live where they want to live. That, ladies and gentlemen of the jury is wrong. We have a right to live where we want to live and it is a right that we cherish very dearly. It is a right that we want - -

Mr. Scheetz: Your Honor, this is not proper rebuttal.

The Court: All right. Well, let's - -
Let's focus it on the charges, Ms. Wright.

Ms. Wright: That is what this case is

also about too. False statement that this man made to protect someone who violated the rights of someone who had a right to live where they want to live.

Mr. Scheetz: Same objection, Your Honor.

Ms. Wright: Thank you, ladies and gentlemen of the jury.

This argument is clearly an attempt to persuade the jury that it should convict in order to vindicate the right of all citizens to live where they want to live. The Prosecutor clearly stated that “we have a right to live where we want to live and it is a right that we cherish very dearly.” When an objection was sustained, she went on to state: that [the right to live where we want to live] is what this case is also about too.”

In addition to the fact that the statements are improper, the problem is compounded in two ways. First, this is an issue that defense counsel had clearly anticipated, had raised with the Court, and the Prosecutor had been admonished not to argue to the jury that the defendant should be convicted for any reason other than his alleged false statements and perjured testimony. Secondly, the Prosecutor continued the argument even after an objection had been sustained. When defense counsel objected a second time, the Prosecutor promptly terminated her argument before the Court could rule on the objection.

No limiting instruction was given to the jury at that time. Subsequent to the submission of the case to the jury, defense counsel made a motion for a mistrial

based upon the improper comments by the Prosecutor. The Court denied the motion and indicated that a jury verdict would be taken. However, it was clearly understood that the matter would be renewed in a motion for new trial.

Turning to the two factors the Court must analyze in determining whether there is reversible misconduct, the first is whether the comments were improper. As indicated, this Court believes that the comments were improper. A plea was made to the jury to vindicate the rights of people to live where they choose to live, which is an improper argument in the context of the issues of this case. As indicated, the problem was compounded by the fact that this argument had been anticipated by defense counsel, and there were discussions with all parties that the defendant should not be convicted for any reason other than his alleged false testimony.

Turning to the prejudice analysis, as indicated, the Court looks at principally three factors. First, there is the cumulative effect of the misconduct. In this case, there are two principal areas of misconduct. First, there is the calling of the jury's attention to the redacted portion of the grand jury testimony and, secondly, the improper rebuttal argument. In the context of the entire trial in this case, the Court finds that the cumulative effect is substantial; particularly, in the light of the fact that the comments during the rebuttal continued after the Court had sustained the defendant's objection.

The second issue is the strength of the properly admitted evidence of the

defendant's guilt. This trial was quite short. The Government had a strong but not overwhelming case. The defendant did testify in front of the grand jury and did admit to the FBI that Mr. Von Lienen had been involved in the July 7, 1997, cross burning. He made the argument that why would he implicate Mr. Von Lienen in one cross burning if it was his intent to provide an alibi for the second cross burning. While the jury did not ultimately accept that argument, it was certainly not an implausible argument to make to the jury. The Court does not believe that the strength of the properly admitted testimony was so overwhelming or so strong as to overcome the prejudice of the improper comments.

Finally, there is the issue of the curative action taken by the trial court. After the first improper comment, that is, the reference to the redacted portion of the grand jury transcript, the Court did admonish the jury not to draw any inference from the redaction. Consequently, an appropriate curative instruction was given.

Unfortunately, no instruction was given as to the improper closing comment. The Government argues that the defendant should bear the brunt of the failure to give a limiting instruction. However, it should be noted that neither party asked that any curative action be taken. As a result, this factor cannot be used to mitigate against the improper conduct by the Prosecutor.

In summary, this Court believes that in the context of this very short trial, the improper conduct was such that a new trial should be granted. The Government has

made a speculative but plausible argument that the defendant received a fundamentally fair trial, however, the Court believes that the defendant deserves more than what he got. If the defendant is to be ultimately convicted and possibly sent to jail for his alleged false statements to the FBI and perjured testimony, the conviction should be as a result of a trial that is not tainted by prosecutorial misconduct.

IT IS THEREFORE ORDERED that the defendant's motion for new trial is granted.

IT IS FURTHER ORDERED that the Court will hold a scheduling conference with counsel to set a new trial date.

Done and Ordered this _____ day of October, 2001.

Michael J. Melloy, Judge
UNITED STATES DISTRICT COURT